No. 15,335

United States Court of Appeals

For the Ninth Circuit

THE CANADIAN INDEMNITY COMPANY, a corporation,

Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

EDWARD A. FRIEND,
519 California Street,
San Francisco 4, California,
Attorney for Appellant.

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

No. 15,335

United States Court of Appeals
For the Ninth Circuit

THE CANADIAN INDEMNITY COMPANY, a corporation,
Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, PRUDENTIAL ASSURANCE COMPANY LIMITED OF LONDON, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

PROCEEDINGS BELOW AND STATEMENT OF FACTS.

Plaintiff-Appellant filed suit for declaratory relief in the District Court against Defendants-Appellees under 28 U.S.C. 2201 and 2202. Federal jurisdiction exists under 28 U.S.C. 1332 on the ground of alienage: Plaintiff is a Canadian corporation, defendant Ohio Farmers is an Ohio corporation, all other de-

fendants are subjects of Britain, and the amount in controversy exceeds $3000, exclusive of interest and costs.

Plaintiff Canadian's first amended complaint in declaratory relief appears at R. 3-5. The complaint alleges that Canadian insured the liability of one Louis Store, a grocery store located on MacArthur Boulevard, Oakland, to the extent of $100,000; that one Virginia Christensen was allegedly injured in said store on September 17, 1954, as the result of the negligence of an employee or employees of said store; that defendants also carried liability insurance in favor of Louis Stores; and that plaintiff sought adjudication of its obligations and those of defendants to pay any liability that might be assessed against Louis Stores, Inc., and its employees in favor of Virginia Christensen.

Ohio Farmers Indemnity Company answered the amended complaint in declaratory relief, R. 5-7. It admitted having a policy in favor of Louis Stores, Inc., in the sum of $10,000.

Defendant Prudential Assurance Company Limited of London and other Lloyd's underwriters answered plaintiff's amended complaint, R. 7-22, appending to its answer as an exhibit a complete copy of its policy. It admitted having an "excess policy" in favor of Louis Stores, Inc., and, as appears from the text of the policy at R. 13, the Ohio Farmers' policy is defined as the "underlying policy" and is referred to in the Lloyd's policy as the "primary insurers." The

Lloyd's underwriters, by this policy, obligated themselves to pay $40,000 after the $10,000 provided by Ohio Farmers had become exhausted. Clause 5 of the Lloyd's policy, as printed at R. 16, is headed "Maintenance of Primary Insurance." It says that the Lloyd's policy is subject to the same warranties, terms and conditions "as are contained in or may be added to the policy of the primary insurers prior to the happening of an accident for which claim is made hereunder. . . ."

As may be seen from Endorsement No. 3 to the Lloyd's policy, as printed at R. 20, the Lloyd's underwriters agreed as follows:

> "In consideration of the premium charged, it is understood and agreed that wherever the assured has contracted to protect any individual, firm, or corporation by insurance such individual, firm, or corporation shall be deemed an assured under this policy . . ."

The Ohio Farmers' policy had an endorsement entitled "Defense of Employees." That endorsement, Endorsement No. 4 to the Ohio Farmers' policy, was typewritten, not printed. It is quoted in full in Finding No. V1, as amended, of the District Court at R. 51-53. The policy issued by plaintiff Canadian to Louis Stores, Inc., contains no such endorsement.

After the instant declaratory relief action had been commenced by Canadian in the United States District Court, Virginia Christensen commenced an action to recover damages for personal injuries in the Superior

Court of the State of California, in and for the County of Alameda. This Superior Court action was filed against Louis Stores, Inc., two of its employees, namely, Earl Correia and Clifton Land, and other defendants, as to whom nonsuits were later granted. Concerning said Superior Court suit, the handling of its defense and its result, attention is respectfully directed to plaintiff's request for admissions filed in the District Court with Exhibits "A", "B", "C", "D" and "E" attached thereto. Said request for admissions and all exhibits are reprinted at R. 23-42, and it was stipulated in open court that all statements therein contained are true, as shown by the excerpts from the reporter's transcript printed at R. 64-65. It is clear from Exhibit "B", attached to said request for admissions and reprinted at R. 31-32, that the writer of this brief, as attorney for Louis Stores, Inc., in the Superior Court action, made written demand upon Ohio Farmers Indemnity Company that it undertake the defense of the named employees Correia and Land under its policy issued to Louis Stores, Inc.; and particularly under its Endorsement No. 4 to that policy hereinabove referred to. It is also clear that Ohio Farmers did undertake the defense of said employees, pursuant to such written demand: Paragraph 4 of request for admissions printed at R. 23-24.

The first amended complaint for damages in the Superior Court action appears at R. 33-37, as Exhibit "C" to the request for admissions. It is the complaint upon which issue was joined in the Superior

Court and upon which trial was had. Paragraph V of said Superior Court complaint, at R. 34, alleges that Land and Correia were employees of Louis Stores, Inc., and were acting in the scope and course of their employment. Paragraph VIII of said complaint, at R. 35, contains the essentials of the charge of negligence: In essence, that defendants caused and permitted a cardboard carton to be in an aisle of the grocery store in such manner as to render the aisle dangerous to the passage of customers. As a consequence of such negligence, it appeared that Mrs. Christensen tripped over the cardboard carton in the aisle and sustained serious injuries when she fell to the floor.

Louis Stores, Inc., admitted, in paragraph IV of its answer at R. 39, that Land and Correia were employees.

Land and Correia, appearing by the law firm retained for that purpose by Ohio Farmers, pursuant to written demand under their policy hereinabove referred to, filed an answer to the amended Superior Court complaint, which answer appears at R. 40-42. In paragraph I of said answer, the answering defendants allege that they "are not required" to answer the allegation of that paragraph of the complaint containing the allegation of employment.

The Superior Court action was tried to a jury. Land and Correia testified in their own behalf and no other witness was called in their behalf by their counsel, Mr. Walcom, paragraph 8 of plaintiff's re-

quest for admissions in the District Court, printed at R. 24-25.

The complete testimony of Earl Correia and Clifton Land, as given in the Superior Court, was reprinted and was received in evidence by the District Court at the trial of this case as plaintiff's exhibits 1 and 2. It appeared from the testimony of those two parties in the Superior Court action that Correia was the manager of the Louis Store in question on the date of Mrs. Christensen's accident. Correia determined how many employees were necessary at any particular hour and Correia instructed them as to their duties, Correia's testimony, page 9. Correia realized the hazard presented by a box left in the aisle of a grocery store and for that reason instructed the man on duty always to stock a particular shelf until any one box was empty and then to get the box out of the aisle, as shown by page 10 of Correia's testimony. Earl Correia inspected the grocery department thoroughly when he left for the day, shortly before the occurrence of this accident; at that time, all of the aisles were clear, Correia's testimony, page 7.

Mrs. Christensen was injured between seven and nine in the evening. During those hours on this particular night, Clifton Land, an employee of Louis Stores, Inc., was in charge of the grocery department, assisted only by Donald Nolan, a sixteen-year-old "courtesy boy," who ran errands and swept the floors, but who was not permitted to take stock out of boxes and put the stock on the shelves; this work had to be done only by a clerk, Correia's testimony, page 9.

A customer asked Clifton Land for a bottle of Alhambra distilled water. The ensuing events are described in detail at pages 6-10 of Land's testimony. It is clear that Land, himself, deliberately left the box in the aisle, pushing it up against the "gondola" with five bottles of distilled water still remaining in the box of the six it had originally contained. It was over this box that Mrs. Christensen tripped and fell, while shopping for various groceries. Based upon this evidence, the jury returned a verdict in favor of Mrs. Christensen and against both Clifton Land and Louis Stores, Inc., his employer. The jury found in favor of defendant Earl Correia, thereby exonerating him. The verdict is reprinted as paragraph 11 of plaintiff's request for admissions at R. 25-26. That Superior Court judgment has become final and has not been satisfied.

The text of the District Court's opinion occupies one and one-quarter pages of the Federal Supplement, *Canadian Indemnity v. Ohio Farmers,* 140 F. Supp. 437. The District Court, in footnotes at 140 F. Supp. 439, quotes part of defendant Ohio Farmers' Endorsement No. 4, and in such footnote the District Court significantly underlines certain words. The District Court omits the last two paragraphs of Ohio Farmers' Endorsement No. 4 from the part quoted in the footnote to its opinion. This underlining at 140 F. Supp. 439 is here emphasized because it seems to furnish the only indication of why the District Court held that Land was not insured under the policies written by defendants Ohio Farmers and

Lloyd's underwriters; and the question of whether or not Land was so insured is the basic question in this case.

Plaintiff Canadian moved for a new trial in the District Court, R. 59. The motion was heard by the District Court on July 26, 1956, and excerpts from the reporter's transcript of arguments by counsel appear at R. 65-66. It is significant that Mr. Walcom, the attorney retained by Ohio Farmers all through these proceedings to represent that company in the Federal Court action and to represent the employees Land and Correia in the Superior Court action, said in open court, concerning whether or not a proper request in writing to defend the employees had been made under the Ohio Farmers' policy, "But it is a false issue in that we admit that we defended Land and Correia." The brief statement made at that time on behalf of Canadian by the writer of this brief, concerning that request in writing to Ohio Farmers to defend the employees, is reprinted at R. 66.

The District Court denied the motion for a new trial in a minute order dated July 26, 1956, R. 60.

From the judgment based upon the District Court's opinion, findings and conclusions, this appeal is taken.

QUESTIONS PRESENTED.

(1) Are Defendants-Appellees Ohio Farmers and Lloyd's underwriters obligated under their policies

to satisfy the judgment assessed against Clifton Land in the Superior Court action?

(2) As between Louis Stores, Inc., on the one hand, and Clifton Land, on the other hand, which, if either of the two of them (and therefore which insurers), bears the ultimate responsibility to satisfy the Superior Court judgment rendered in favor of Mrs. Christensen?

SPECIFICATION OF ERRORS.

(1) The District Court erred in its finding of fact No. IV (R. 50). The record in the Superior Court case had no evidence sufficient to support verdict and judgment against Louis Stores, Inc., upon the basis of "independent negligence."

(2) The District Court erred in its finding of fact No. VI (R. 51) when it says, at R. 53, concerning the Ohio Farmers' policy, "said policy did not insure Clifton Land."

(3) The District Court erred in its finding of fact No. VIII, at R. 54, when it said, concerning the policy issued by defendant Lloyd's underwriters, "said policy did not insure Clifton Land."

(4) The District Court erred in its conclusions of law Nos. I, II, IV and VI, which are based upon its findings of fact.

(5) The District Court erred in failing to find that the primary liability falls upon the active tort-feasor Clifton Land and his insurers.

ARGUMENT.

I.

DEFENDANTS-APPELLEES ARE OBLIGATED UNDER THEIR POLICIES TO PAY THE LIABILITY IMPOSED UPON CLIFTON LAND IN FAVOR OF MRS. CHRISTENSEN BY THE SUPERIOR COURT JUDGMENT.

Endorsement No. 4 annexed to the Ohio Farmers' policy is a typewritten endorsement, as distinguished from a printed form. It was prepared specifically for this particular policy. It contains five paragraphs and is set forth in full as part of the District Court's finding No. VI, at R. 51-53. Only three of the five paragraphs are quoted by the District Court in the footnote to its opinion at 140 F. Supp. 439; it is submitted, however, that the document must be considered as a whole and that no part of it may be disregarded. It is submitted, furthermore, that each paragraph thereof must be given some meaning and that in any case of doubt or ambiguity, it must be construed against Ohio Farmers Indemnity Company, which drafted it, and in favor of coverage.

As a preliminary matter, it seems clear that the endorsement is an integral part of the policy and part of the contract of insurance:

> *Burch v. Hartford Fire Ins. Co.,* 85 Cal. App. 542, 259 P. 1108;
>
> *Jew Fun Him v. Occidental Life Ins. Co.,* 88 Cal. App. (2d) 246, 198 P. (2d) 711.

Section 380, Insurance Code of California, defines a policy as follows:

> "The written instrument, in which a contract of insurance is set forth, is the policy."

As hereinabove stated, Endorsement 4 is typewritten, whereas the bulk of Ohio Farmers' policy is printed. Attention is respectfully directed to Civil Code 1651, reading as follows:

> "Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form. And if the two are absolutely repugnant, the latter must be so far disregarded."

Attention is also directed to Civil Code 1654, reading as follows:

> "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

The first paragraph of Ohio Farmers' Endorsement 4 says that *the company will defend certain suits on behalf of employees, if and when requested in writing to do so by the named insured.* That condition has been met in the case at bar. The named insured was Louis Stores, Inc. The named insured did request

Ohio Farmers, in writing, to defend the three employees sued in the Superior Court action. The writing appears as Exhibit "B" attached to plaintiff's request for admissions under Rule 36. Exhibit "B" is a copy of a registered letter, dated February 15, 1955, sent to Ohio Farmers by the attorney for Louis Stores, Inc., making specific demand under that endorsement that the defense be undertaken.

Ohio Farmers did undertake the defense of the employees, pursuant to said request in writing, as indicated by paragraph 4 of plaintiff's request for admissions. It has been stipulated that all facts contained in the request for admissions are true. It is here reiterated that Mr. Walcom, himself, in open court, described as "a false issue" any suggestion that the request in writing to defend did not come from the named insured, merely because the request was signed by the attorney representing the named insured in the accident case.

Referring to the additional language in the first paragraph of said Endorsement 4, the named insured was joined with the employees in such suit, and the suit was one which the company was obligated to defend under its policy.

Paragraph two of Endorsement 4 says that the company will pay any loss by liability imposed upon the said employees by final judgment in any *such suit*. It is here submitted that the Alameda County Superior Court action was such a suit, for the reasons just mentioned:

(a) The named insured did request the company in writing to defend on behalf of the employees;

(b) The suit did allege bodily injury covered by the policy;

(c) The named insured was joined as defendant; and

(d) The suit was one which the company was obligated to defend on behalf of the named insured under the policy.

Section 23, California Insurance Code, contains a definition basic to any question of insurance. It reads as follows:

> "*'Insurer' and 'insured.'* The person who undertakes to indemnify another by insurance is the insurer, and the person indemnified is the insured."

It is submitted that nothing could be more clear than that Ohio Farmers, by paragraph 2 of said endorsement, has made the employees of Louis Stores, Inc., "persons indemnified," as that term is used in the statutory definition of Insurance Code Section 23, for the reason that undertaking to indemnify another, on the one hand, and paying any loss by liability imposed by final judgment, on the other hand, are identical in meaning. Even if there were any doubt, it is a fundamental principle of construing insurance policies that any doubt or ambiguity must be resolved against the insurance company which drafted the policy.

The fourth paragraph of Endorsement 4 says that the company will provide no coverage except where the act of the employee was committed in good faith and was within the scope of employment. It was admitted by all answers in the Superior Court pleading that the employees, especially Land, were acting within the scope of employment. There is no evidence that the alleged acts were committed in bad faith. Hence, paragraph four of Endorsement 4 means by necessary implication that the company does provide coverage in this case.

Paragraph five of Endorsement 4 says that the *insurance provided by the endorsement* shall be in excess over any *other* valid and collectible insurance available to any employee of the named insured. This language denotes by necessary implication that the endorsement *does* provide insurance because, otherwise, paragraph five of the endorsement would make no sense. (Emphasis supplied.)

Paragraph three of the Endorsement says that no privity in contract is created between the company and the employees. It is submitted that the endorsement may not be interpreted in the light of paragraph three alone. Paragraph three must read in conjunction with the other four paragraphs and all must be given meaning, if possible. It is here suggested that paragraph three of the endorsement means that an employee has no right, acting on his own, to require the company to defend him and pay any judgment rendered against him, in the absence of the conditions enumerated in the first paragraph of

said endorsement. It is submitted, however, that once the conditions stated in paragraph one are met, and once the company does so defend, that the employees defended thereupon do become insureds; for, if such employees do not then become insureds, paragraphs two, four and five are rendered meaningless.

(The precise language of paragraph three of Endorsement 4 should be noted: It reads in part, ". . . nor shall this *paragraph* confer any rights upon said employees which said employees would not have had if this *paragraph* had not been written." (Emphasis supplied.) As a technical matter, paragraph three conferred no rights at all upon the employees which they would not have had if paragraph three had not been written and, therefore, the clause seems wholly senseless. What was probably meant is "endorsement" instead of "paragraph." That *paragraph,* however, does not purport to confer any "rights" upon anyone. But whether or not any "rights" are conferred, and whether or not the defendant Ohio Farmers chooses to describe the relationship with the words "privity of contract" or not, the fact remains that by paragraph two it has contracted to pay any loss by liability imposed upon employees by final judgment, and the fact remains that by paragraph four it has agreed to provide coverage for an act in good faith within the scope of employment, and the fact remains that in paragraph five the insurance provided by this endorsement is described as excess insurance over any other valid and collectible insurance available to any employee.)

In this connection, attention is directed to Williston on Contracts, Section 619, reading:

> "The court will if possible give effect to all parts of the instrument and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and if this is impossible a construction which gives effect to the main apparent purpose of the contract will be favored."

It is also respectfully suggested that paragraph three of the endorsement is a recital of law, stating the company's conclusions concerning privity of contract. Paragraphs one, two, four and five, however, are operative parts of the contract, not recitals; they state what the company will do or will not do, as contrasted with a recitation of the company's conclusions of legal status. In this connection, plaintiff-appellant wishes to direct the court's attention to this language in Note 98 at II Williston on Contracts, 1201:

> "If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

The State Supreme Court has very recently handed down its decision in *Continental Casualty Co. v. Phoenix Construction Co., Underwriters at Lloyd's, London, et al.,* 46 Cal. (2d) 423, 296 P. (2d) 801. This opinion reads, at 437:

"It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer."

At pages 437-438, the court says:

"If the insurer uses language which is uncertain any reasonable doubt will be resolved against it; if the doubt relates to extent or fact of coverage, whether as to peril insured against . . ., the amount of liability . . ., or the person or persons protected . . ., the language will be understood in its most inclusive sense, for the benefit of the insured."

Many citations are given.

As the Supreme Court of California says, at page 431 of the opinion cited:

". . . if there is a conflict in meaning between an endorsement and the body of the policy, the endorsement controls. . . . Likewise, under the provisions of section 1651 of the Civil Code, the written or specially prepared portions of the contract control over those which are printed or taken from a form. The provisions of the two endorsements, as quoted above, are typewritten, while, as already mentioned, the insuring agreements are part of the printed policy form."

It is reiterated that the typewritten Endorsement number 4 should take precedence over any seeming inconsistency in the body of the Ohio Farmers' policy which is a printed form.

At page 439, the Supreme Court discusses the provisions of a Lloyd's policy similar to the Lloyd's

policy in the case at bar, and concludes that it increases the protection of an insured under the primary policy, by virtue of having the same warranties, terms and conditions. Hence, it is submitted that if Ohio Farmers is obligated to pay the liability imposed upon Land by final judgment in the Superior Court suit, the Lloyd's underwriters are similarly obligated. It is also reiterated that under Endorsement No. 3 to the Lloyd's policy, appearing at R. 20, Lloyd's obligated itself to protect as an assured any individual, firm or corporation whom the named insured has contracted to protect.

The preconditions of paragraph one of the endorsement have been met, as admitted in plaintiff's request for admissions. The Ohio Farmers Indemnity Company did defend, pursuant to written request by the named insured. The operative parts of that endorsement, as contrasted with the one recital, all indicate that Land is an insured in this case. The typewritten endorsement takes precedence over the printed form of the policy. Any ambiguity must be resolved against the company which drafted the form and in favor of coverage. Paragraphs two, four and five of the endorsement must have some meaning. A logical meaning has been suggested for paragraph three which harmonizes it with all other provisions of the policy.

In the opinion of the District Court at 140 F. Supp. 439, the first three paragraphs of Endorsement 4 are printed in the footnote with certain words underlined. In paragraph one of the endorsement, the Court underscored the words "if and when requested in

writing to do so by the named insured . . .'' In paragraph two of the endorsement, the Court underscored the words ''such suit,'' which refer back to a suit which the named insured has requested the company in writing to defend. Since the use of underlining is the only indication furnished by the District Court as to its reasons for holding that Endorsement 4 does not impose upon defendants-appellees the obligation to pay Land's liability, it may be inferred that the District Court felt the named insured had not requested Ohio Farmers in writing to defend in the name and on behalf of its employees. It is clear, however, that a registered letter was sent to Ohio Farmers by the attorney representing the named insured in the very accident suit involved; and that letter made specific request, under the specific endorsement, that the defense of the employees be undertaken. It is also clear that Ohio Farmers did undertake the defense pursuant to that request. Even Mr. Walcom, attorney for defendant-appellee Ohio Farmers, said in open court concerning this subject: ''But it is a false issue in that we admit that we defended Land and Correia.'' R. 66.

II.

AS BETWEEN LOUIS STORES, INC. AND CLIFTON LAND, CLIFTON LAND (AND HIS INSURERS) IS PRIMARILY OBLIGATED TO SATISFY THE SUPERIOR COURT JUDGMENT.

A. An employer which becomes liable as a result of respondeat superior for an employee's negligence is entitled to reimbursement from the employee.

This proposition has become so well established in our law as to need little discussion. It has been stated most recently in *Continental Casualty Co. v. Phoenix Construction Co., et al.,* 46 Cal. (2d) 423, at 429.

It has been forcefully stated by this Court in *Canadian Indemnity Co. v. U. S. F. & G.,* 213 F. (2d) 658, affirming *U. S. F. & G. v. Canadian Indemnity Co.,* 107 F. Supp. 683. These cases and the precedents therein cited are clear to the effect that an employer or the employer's insurance carrier may recoup any loss sustained from the negligent employee and the employee's insurance carrier, the latter being primarily liable.

B. Judgment against Louis Stores, Inc. in the Superior Court must have been based upon respondeat superior for the negligent act of Clifton Land.

The gravamen of the charge of negligence upon which the Superior Court suit was based is contained in paragraph VIII of the first amended complaint filed in that suit, R. 35. It alleges that the defendants and each of them ". . . so carelessly and negligently operated, maintained and controlled said market and said grocery department therein and said aisle open to the public therein so as to cause and permit a cardboard carton to be in said aisle in said

grocery department in such manner so as to render said aisle dangerous to the passage of customers and business invitees in said market and said grocery department thereof lawfully using said aisle."

It is clear from the pleadings and the stipulations, as well as from the testimony, that Clifton Land was an employee of Louis Stores, Inc., and was at all relevant times acting in the course of his employment. It is also clear that it was Clifton Land who deliberately caused and permitted the cardboard carton in question to remain in the aisle of the grocery store a short time before plaintiff tripped over it, whereas all the aisles had been cleared shortly before this accident happened. It is also clear from the testimony of Correia that Land had been instructed not to do this but to finish stocking all the contents from any one box, which he caused to be brought out of the storeroom, and then to remove the box from the aisle. It is also clear from the testimony that it would have taken Land only a few seconds longer to remove the other five bottles of Alhambra water remaining in the box and take the box out of the aisle. It has been admitted that the court instructed the jury that if they found Land negligent, they must also find Louis Stores, Inc., liable, because of *respondeat superior*.

Based on these allegations and these facts, what conceivable theory could support liability on the part of Louis Stores, Inc., other than *respondeat superior* for the negligence of Land? Directly applicable to this case is the language of the court in *Pleasant Val-*

ley Association v. Cal-Farm Insurance Co., 142 Cal. App. (2d) 126, 298 P. (2d) 136. In that case, defendant contended that there was some independent negligence on the part of the corporation Pleasant Valley Association. The court pointed out, however, that a corporation may act only through persons. After outlining the acts of negligence which that case involved, the court said:

> "All these were acts which Pleasant Valley could only perform through its agents and employes, and it was stipulated at the trial that the wooden blocks had been placed by Croker. The complaint in the Nungaray action and the stipulation of facts in this action are silent as to any acts or omissions on the part of Pleasant Valley other than those of Croker. The complaint alleges that Nungaray drove the truck onto the platform at Croker's direction, and that Croker was in charge of the elevating machinery. Reading the Nungaray complaint as a whole, we are of the opinion that Pleasant Valley's negligence is therein predicated upon the negligence of Croker, and that it does not allege separate, concurring negligence on Pleasant Valley's part."

Similarly, in the situation at bar, causing and permitting a cardboard carton to be in the aisle were acts which Louis Stores, Inc., could only perform through people; and in this case the proof showed that it was specifically through Clifton Land. He caused and permitted the carton to be exactly where Mrs. Christensen tripped over it. As the court said in *Gardner v. Jonathan Club,* 35 Cal. (2d) 343, 217

P. (2d) 961, "since defendant is a corporation, it can act only through its employees."

In the case at bar, Correia and Land were the only two employees sued, and the complete transcript of their testimony was placed in evidence before the District Court. No suggestion of any misconduct on the part of the corporation, other than the acts of these two employees, was ever made in the Superior Court; and no evidence of any such acts of "independent negligence" was placed before the District Court by defendants-appellees.

The District Court, in its opinion at 140 F. Supp. 439, expresses the view that Louis Stores, Inc., may have been held liable on some other basis than *respondeat superior*. The District Court said, "The jury may have found Louis Stores, Inc., negligent in not providing enough employees, or in not properly instructing its employees what to do. There was enough evidence on which to base such a finding . . ."

It is submitted that in this statement the District Court errs, *in view of the fact that the jury exonerated Correia.* For it was Correia who, as manager of the store, decided how many employees should be placed on duty at any one time, including this particular evening; and it was Correia who instructed the employees what to do. Attention is earnestly directed to the testimony of Correia, complete transcript of which was placed in evidence before the District Court. At page 3, it is clear that Correia was the manager of the store in question and the one in charge of the

premises. No one superior to Correia in the corporation was present in the store, except for periodic visits, and Correia was the one in charge. Correia knew that a single low box in the aisle, below eye level, could be a hazard to safety *and, he had been told that repeatedly by his supervisor,* testimony of Correia, page 6. Correia inspected the aisle before going home, shortly before this accident, and the aisle was clear, testimony of Correia, page 7.

Correia made the decision as to how many employees should be there that particular night, testimony of Correia, page 9. Correia's instructions to Land were that if he had a box in the aisle, he was to stock the shelf he was working on until he had the box empty and then get the box out of the aisle, testimony of Correia, 10:13-19.

It is submitted that the verdict in favor of Correia, the store manager, negatives the suggestions made by the District Court concerning the two possible bases of liability on the part of Louis Stores, Inc., other than *respondeat superior* for the negligence of Land. If Louis Stores failed to provide enough employees, or if it failed properly to instruct its employees, it must have perpetrated such failures through the person of Correia; for he was the store manager and the one who did the acts of deciding how many employees there would be and of instructing Clifton Land. The verdict exonerating Correia, however, must mean that Louis Stores, Inc., was not negligent in these respects. The sole act of negligence shown by

the evidence was the negligence of Clifton Land. His was the only act of negligence alleged by the pleadings in the Superior Court action. Opposing counsel have failed to show the trial court any other act on the part of this corporation, consistent with the evidence and the pleadings, which could possibly form the basis of the judgment against it.

C. In addition to the arguments heretofore made, the only active negligence in this case was that of Clifton Land and hence the ultimate liability falls on him and his insurers.

From the evidence adduced in the Superior Court case and from the verdict, the jury clearly found that Clifton Land was negligent and that his negligence was the proximate cause of Mrs. Christensen's accident.

To hypothesize a different case, it is conceivable that had Louis Stores, Inc., been the only defendant sued, as the result of the customer's having tripped over a box in the aisle, verdict and judgment would have gone against Louis Stores, Inc., alone, on the ground that a corporation operating grocery stores is under duty to the public at all times to keep the aisles clear, even though the customer is unable to prove just how the box got into the aisle. The corporation in such case would be negligent toward the injured plaintiff although, as between the corporation and the person who caused the box to be in the aisle, the negligence of the corporation is passive and the negligence of the person is active. A corporation, it is reiterated, may act only through persons.

This Court, speaking through District Judge Hamlin, sitting pro tem. as a Circuit Judge, has recently held that a shipowner held liable to a stevedore injured on board ship may recover over from the stevedoring company whose negligence caused the injury; on the ground that even though the shipowner was negligent, its negligence was passive, and the negligence of the stevedoring company was the active negligence.

American President Lines Ltd. v. Marine Terminals Corp., 234 F. (2d) 753 (rehearing denied).

In the case at bar, it is submitted by analogy that even though Louis Stores, Inc., may be thought to have some liability to Mrs. Christensen in the absence of a suit against Land, nevertheless, where it is shown that the active negligence was that of Land, the passively negligent corporation may recover over from the actively negligent tort-feasor. Concerning his active negligence, there can be no doubt.

CONCLUSION.

The judgment of the District Court should be reversed and the rights of the parties to this proceeding should be declared as follows:

(1) Defendants-appellees are obligated under their respective policies to pay the liability assessed against Clifton Land in the Alameda County Superior Court action;

(2) The liability of Clifton Land and his insurers is primary to that of Louis Stores, Inc., and its insurers.

Dated, San Francisco, California,
February 27, 1957.

Respectfully submitted,
EDWARD A. FRIEND,
Attorney for Appellant.

This Court, speaking through District Judge Hamlin, sitting pro tem. as a Circuit Judge, has recently held that a shipowner held liable to a stevedore injured on board ship may recover over from the stevedoring company whose negligence caused the injury; on the ground that even though the shipowner was negligent, its negligence was passive, and the negligence of the stevedoring company was the active negligence.

> *American President Lines Ltd. v. Marine Terminals Corp.,* 234 F. (2d) 753 (rehearing denied).

In the case at bar, it is submitted by analogy that even though Louis Stores, Inc., may be thought to have some liability to Mrs. Christensen in the absence of a suit against Land, nevertheless, where it is shown that the active negligence was that of Land, the passively negligent corporation may recover over from the actively negligent tort-feasor. Concerning his active negligence, there can be no doubt.

CONCLUSION.

The judgment of the District Court should be reversed and the rights of the parties to this proceeding should be declared as follows:

(1) Defendants-appellees are obligated under their respective policies to pay the liability assessed against Clifton Land in the Alameda County Superior Court action;

(2) The liability of Clifton Land and his insurers is primary to that of Louis Stores, Inc., and its insurers.

Dated, San Francisco, California,
February 27, 1957.

Respectfully submitted,
EDWARD A. FRIEND,
Attorney for Appellant.